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IN THE

Supreme Court of the United States

OCTOBER TERM, 1936.

No. 324

THE VIRGINIAN RAILWAY COMPANY,
Petitioner,

v.

SYSTEM FEDERATION NO. 40, RAILWAY EMPLOYEES DEPARTMENT OF THE AMERICAN FEDERATION OF LABOR, IN ITS OWN RIGHT AND AS THE ACTUAL AND LEGALLY DESIGNATED REPRESENTATIVE OF ALL MACHINISTS, BOILERMAKERS, BLACKSMITHS, SHEET METAL WORKERS, CARMEN, COACH CLEANERS, AND THEIR RESPECTIVE SPECIALISTS, APPRENTICES, AND HELPERS IN THE EMPLOY OF THE VIRGINIAN RAILWAY COMPANY IN THE STATES OF VIRGINIA AND WEST VIRGINIA, E. J. PRESTON, INDIVIDUALLY, AS SYSTEM GENERAL CHAIRMAN AND AS GENERAL CHAIRMAN FOR THE MACHINISTS, ANDY DUNCAN, INDIVIDUALLY AND AS GENERAL CHAIRMAN FOR THE BOILERMAKERS, W. S. PENTURFF, INDIVIDUALLY AND AS GENERAL CHAIRMAN FOR THE BLACKSMITHS, W. M. SARVER, INDIVIDUALLY AND AS GENERAL CHAIRMAN FOR THE SHEET METAL WORKERS, A. P. WYATT, INDIVIDUALLY AND AS GENERAL CHAIRMAN FOR THE ELECTRICIANS, AND P. L. ALLEN, INDIVIDUALLY AND AS GENERAL CHAIRMAN FOR THE CARMEN AND COACH CLEANERS,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

JAMES PIPER,
H. T. HALL,
W. H. T. LOYALL,
JOHN C. DONNALLY,
Counsel for Petitioner.

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IN THE

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OCTOBER TERM, 1936.

No. .....

THE VIRGINIAN RAILWAY COMPANY,

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SYSTEM FEDERATION NO. 40, RAILWAY EMPLOYEES DEPARTMENT OF THE AMERICAN FEDERATION OF LABOR, IN ITS OWN RIGHT AND AS THE ACTUAL AND LEGALLY DESIGNATED REPRESENTATIVE OF ALL MACHINISTS, BOILERMAKERS, BLACKSMITHS, SHEET METAL WORKERS, CARMEN, COACH CLEANERS, AND THEIR RESPECTIVE SPECIALISTS, APPRENTICES, AND HELPERS IN THE EMPLOY OF THE VIRGINIAN RAILWAY COMPANY IN THE STATES OF VIRGINIA AND WEST VIRGINIA, E. J. PRESTON, INDIVIDUALLY, AS SYSTEM GENERAL CHAIRMAN AND AS GENERAL CHAIRMAN FOR THE MACHINISTS, ANDY DUNCAN, INDIVIDUALLY AND AS GENERAL CHAIRMAN FOR THE BOILERMAKERS, W. S. PENTURFF, INDIVIDUALLY AND AS GENERAL CHAIRMAN FOR THE BLACKSMITHS, W. M. SARVER, INDIVIDUALLY AND AS GENERAL CHAIRMAN FOR THE SHEET METAL WORKERS, A. P. WYATT, INDIVIDUALLY AND AS GENERAL CHAIRMAN FOR THE ELECTRICIANS, AND P. L. ALLEN, INDIVIDUALLY AND AS GENERAL CHAIRMAN FOR THE CARMEN AND COACH CLEANERS,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

To the Honorable Charles Evans Hughes, Chief Justice of the United States, and to the Associate Justices of the Supreme Court of the United States:

The Virginian Railway Company respectfully prays that a writ of certiorari issue to review the decree of the United States Circuit Court of Appeals for the Fourth Circuit entered in the above entitled case on June 18, 1936, affirming the decree of the District Court of the United States for the Eastern District of Virginia.

OPINIONS BELOW.

The opinion of the District Court of the United States for the Eastern District of Virginia (R. 254-279) is reported in 11 F. Supp. 621. The opinion of the United States Circuit Court of Appeals for the Fourth Circuit (R. 311-339) has not yet been reported.

JURISDICTION.

The decree of the United States Circuit Court of Appeals for the Fourth Circuit (R. 340) was entered on June 18, 1936. The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED.

1. Whether Section 2, Ninth, of the Railway Labor Act, which provides that a carrier shall treat with the representative of employees certified by the National Mediation Board thereunder, imposes a legally enforceable obligation.

2. Whether Section 2, Ninth, of the Railway Labor Act, as construed by the Circuit Court of Appeals to im-

pose upon carriers a positive, obligatory requirement to treat with a representative so certified as the representative of all the employees in the craft or class, is unconstitutional in that it deprives carriers of their property and liberty of contract in violation of the Fifth Amendment of the Constitution of the United States.

3. Whether the Railway Labor Act is unconstitutional in its entirety in that it attempts to regulate labor relations between carriers and their back-shop employees engaged solely in activities intrastate in character which do not directly affect or burden interstate commerce.

4. Whether Section 2, Fourth, of the Railway Labor Act requires, in the case of an election to determine who shall be the representative of a craft or class, that the representative receive the votes of a majority of all the eligible members of such craft or class; or whether a majority of those voting is sufficient to elect where a majority of those qualified to vote participates in the election.

5. Whether the certification of September 13, 1934, of the National Mediation Board under Section 2, Ninth, of the Railway Labor Act is a nullity because it fails to show that a majority of any craft or class of employees voted in favor of System Federation No. 40, Railway Employees Department of the American Federation of Labor (hereinafter called the Federation), or even that such a majority participated in the election.

6. Whether said certification of the National Mediation Board is a nullity because it improperly includes votes of back-shop employees, engaged solely in intrastate activities not directly affecting or burdening interstate commerce and therefore not subject to Federal regulation, it being impossible to tell what the result of the election would have been if these votes had not been counted.

7. Whether an injunction bottomed on publicity given by the petitioner to the existence of, and the facts involved in, a labor dispute and on acts of employees not participated in, ratified or authorized by the petitioner should have been issued, particularly in view of the provisions of Sections 4 (e), 6 and 7 (a) of the Norris-LaGuardia Act.

8. Whether Section 9 of the Norris-LaGuardia Act prohibits the granting by a court of the United States of a mandatory injunction in a case involving or growing out of a labor dispute.

STATUTES INVOLVED.

The statutes involved will be found in the Appendix, *infra*, pp. 31-43.

STATEMENT.

The mechanical department employees of the petitioner comprise six shop crafts (R. 31, 244). These shop crafts are divided between (1) so-called "back-shop" employees, whose work consists solely of "classified repairs" and "store order work" (with the exception of one man who makes "running repairs" on a switch engine maintained at the back shop) and (2) employees engaged in making "running repairs". "Classified repairs" are heavy repairs made to locomotives and cars, such as rebuilding and putting them in shape for months of service. For the purpose of classified repairs the locomotives and cars are withdrawn from service for an average of approximately 105 days in the case of locomotives and for an average of approximately 109 days in the case of cars. The petitioner has had like work on the locomotives done by the Baldwin Locomotive Works and the Virginia Bridge and Iron Works has rebuilt a great many of its cars. "Store order work" consists of manufacturing material (such as rivets and repair parts) to be placed in

stores at different points on the railroad. If the petitioner can make these articles more cheaply than it can buy them they are made at its back shop; otherwise they are bought on the market. (R. 177-180). "Running repairs" are repairs to equipment other than classified repairs. Approximately one-third of the mechanical department employees are back-shop employees. The back shop, at which all the back-shop employees are employed, is at Princeton, West Virginia. (R. 177, 196).

On July 3, 1922, the United States Railroad Labor Board adopted a resolution calling upon the employees of carriers generally to organize into associations to function in the representation of said employees in disputes involving rules, wages and grievances. The petitioner received an official copy of the resolution (R. 133) and gave information in regard to it to its employees in a bulletin (R. 145). (The record does not disclose the form or contents of this bulletin.) Subsequently the mechanical department employees of the petitioner formed such an association (R. 134), which is hereinafter referred to as the Association, and adopted a written constitution effective October 1, 1922 (R. 224). Beyond posting the bulletin and assisting in "smoothing out" the constitution framed by the employees the petitioner had nothing to do with the organization of the Association (R. 144, 145, 180). The Association and the petitioner then negotiated and executed a contract covering rules, wages and grievances, effective November 15, 1922, and to continue in effect for one year and thereafter until changed as therein provided (R. 244). The contract has not been terminated (R. 142).

The petitioner assisted the Association to function by furnishing meeting places (R. 104), transmitting its notices to members through the company mail (R. 104, 112), paying travelling expenses (R. 115) in an amount

averaging approximately $100 a year (R. 145) and possibly furnishing printed ballots for the elections (R. 81, 111). It is not contended that the petitioner continued any such financial assistance after it became unlawful for it to give it. The petitioner did not interfere in any way with the selection of officers of the Association (R. 110, 111, 120, 142, 167) or with its policies (R. 134, 167).

In the fall of 1933 the American Federation of Labor instituted an intensive campaign for membership among the mechanical department employees of the petitioner (R. 76-77). While this was going on the petitioner, on January 20, 1934, issued a bulletin, the substance of which was that the reports being circulated that the law or the Federal Coordinator of Transportation had outlawed company unions (such as the Association) were unfounded (R. 180-181, 195-196). Other railroads issued similar statements (R. 181). The bulletin was identical with the notice which the Eastern Regional Coordination Committee decided to recommend to the Eastern Presidents' Conference for posting for the information of employees (R. 187-189).

In the spring and summer of 1934 the Federation made various attempts to supplant the Association as representative of the mechanical department employees. (R. 233, 234, 235, 239). Under date of July 11, 1934, while these attempts were continuing, the petitioner distributed to its employees in pamphlet form, a statement (known in the case as the Sasser statement) purporting to be "a plain statement of the facts in connection with the proposed change" from "Company Employee Representation to National Organization Representation". It asked the employees to give due consideration to these facts, adding, however, that the employees were "entirely free to exercise their choice of representatives, free from fear or favor from their employer" (R. 197).

On August 20, 1934, and subsequent days an election was held on the railroad, conducted by a representative of the National Mediation Board, to determine for each of the six shop crafts whether the employees therein, including the back-shop employees, desired representation by the Federation or by the Association (R. 31, 88). Under date of September 13, 1934, the National Mediation Board issued a certification reciting the votes by crafts for the two unions and on the basis thereof certifying that the Federation had "been duly designated and authorized to represent the mechanical department employees of The Virginian Railway Company" (R. 13). The certification does not show the number of eligible voters or otherwise indicate whether or not in any craft the Federation was the choice of the majority or even whether the majority voted in the election. The number of eligible voters was stipulated at the trial. From this stipulation it appears that in two of the crafts, namely the blacksmiths and the carmen and coach cleaners, a majority did not vote for the Federation and in one of them, namely the carmen and coach cleaners, that less than a majority voted in the election (R. 196). Furthermore, it is impossible to tell from the certification or in any other way what the result of the election would have been in any craft without the votes of the back-shop employees.

In the fall of 1934 a union known as the Independent Shop Crafts Association (hereinafter called the Independent) was formed (R. 167-169). It was not organized by the petitioner and the petitioner did not function with it (R. 148-149).

There is evidence that Nevins, the petitioner's master mechanic at Victoria, had a conversation with an employee under him in which he persuaded the employee

not to vote for the Federation (R. 108-109), and, after the election, that Forbes, car foreman at Elmore, obtained petitions repudiating the Federation from several employees and that two workmen on the job circulated several applications for membership in the Independent during working hours (R. 116-120, 122-124), one of them saying he thought it would be best to sign up because the petitioner was not going to recognize the Federation (R. 117).

At a conference on December 27, 1934, the Federation presented to the petitioner for consideration a draft of agreement transferring to the Federation the existing agreement with the Association, with clauses extending its scope to include employees not members of the mechanical department (R. 61, 74, 78). No subsequent conference was held (R. 79).

On May 2, 1935, the respondents instituted suit in the District Court of the United States for the Eastern District of Virginia asking that the petitioner be required to recognize and treat with the Federation as the representative of the mechanical department employees and (among other things) be enjoined from attempting to influence or interfere with said employees thereafter in their choice of representatives for the purpose of collective bargaining (R. 2). On May 20, 1935, the petitioner filed a motion to dismiss (R. 37) and an answer (R. 39). After hearing, the District Court on July 24, 1935, filed an opinion (R. 254) holding that the petitioner should be enjoined from interfering with the respondents and the members of the crafts involved in the matter of self organization and should be required to recognize and treat with the Federation as the representative of the five crafts in which a majority of the eligible voters had participated in the election, that is

to say, all the crafts except the carmen and coach cleaners.

On August 23, 1935, the District Court entered a final decree (R. 279), overruling the motion to dismiss, making findings of fact and granting relief. The court found in the decree (R. 280-281) that the Federation was the duly authorized representative of the petitioner's mechanical department employees, except the carmen and coach cleaners, "having been designated as such" by the certification aforesaid, and that the petitioner, in violation of Section 2 of the Railway Labor Act, had failed to treat with it as such. Pursuant to such findings the court by paragraph 1 of the decree (R. 282) ordered the petitioner to treat with the Federation "so certified as aforesaid".

The court further found in the decree (R. 281-282) that "by means of personal interviews, posted bulletins and by the circulation of a pamphlet [the Sasser statement] calling the attention of its mechanical department employees to the disadvantages attendant upon membership in a standard labor organization and the advantages of a company union, the defendant sought to influence its mechanical department employees against any participation in or association with a standard labor organization and thereby to maintain a mere nominal association or union supported wholly by the defendant, and in the further effort to prevent its mechanical department employees from exercising their free and untrammelled right to choose their own representative"; that the petitioner, by and through its officers, agents and servants, undertook to have the certification aforesaid altered, changed or revoked, and caused the Independent to be organized, all in violation of the Railway Labor Act; and that it continued and now continues by the means aforesaid to endeavor to deprive its mechanical department employees

of any and all right to independent representation, in violation of the Railway Labor Act. Pursuant to the findings aforesaid, the court by paragraph 2 of the decree (R. 282-283) enjoined the petitioner, from interfering with, influencing or coercing any of its mechanical department employees with respect to their right of selecting or designating representatives; from organizing, promoting, fostering or being in anywise concerned with the organization, fostering, maintenance or encouraging any association of such employees with the intent or with the purpose of in anywise interfering with the Federation, or any successor representative, in violation of the Railway Labor Act; from preventing or discouraging such employees from becoming or remaining members of the Federation; and from "entering into any contract, undertaking or agreement of whatsoever kind concerning rules, rates of pay or working conditions affecting its mechanical department employees [which include the carmen and coach cleaners], save and except only with the complainant, System Federation No. 40". There is no evidence that the petitioner participated in, authorized or ratified the acts of the master mechanic, car foreman or workmen testified to or any other acts tending to support the findings summarized in this paragraph, or even that it had any knowledge of them, other than the assistance in "smoothing out" the constitution of the Association in 1922, the two bulletins, the Sasser statement, and the financial assistance formerly given to the Association. The uncontradicted testimony is to the contrary (R. 144, 145, 159, 176, 180, 186).

The Circuit Court of Appeals in an opinion filed June 18, 1936, (R. 311) held that the decree of the District Court should be affirmed and affirmed it by decree entered the same day (R. 340).

SPECIFICATION OF ERRORS TO BE URGED.

The Circuit Court of Appeals erred:

1. In holding that Section 2, Ninth, of the Railway Labor Act, which provides that a carrier shall treat with the representative of employees certified by the National Mediation Board thereunder, imposes a legally enforceable obligation.

2. In failing to hold that Section 2, Ninth, of the Railway Labor Act, as construed by the Circuit Court of Appeals to impose upon carriers a positive, obligatory requirement to treat with a representative so certified as the representative of all the employees in the craft or class, is unconstitutional in that it deprives carriers of their property and liberty of contract in violation of the Fifth Amendment of the Constitution of the United States.

3. In failing to hold that the Railway Labor Act is unconstitutional in its entirety in that it attempts to regulate labor relations between carriers and their back shop employees engaged solely in activities intrastate in character, which do not directly affect or burden interstate commerce.

4. In holding that Section 2, Fourth, of the Railway Labor Act does not require, in the case of an election to determine who shall be the representative of a craft or class, that the representative receive the votes of a majority of all the eligible members of such craft or class; and in holding that a majority of those voting is sufficient to elect where a majority of those qualified to vote participates in the election.

5. In failing to hold that the certification of September 13, 1934, of the National Mediation Board under Section 2, Ninth, of the Railway Labor Act is a nullity because it

fails to show that a majority of any craft or class of employees voted in favor of the Federation, or even that such a majority participated in the election.

6. In failing to hold that said certification of the National Mediation Board is a nullity because it improperly includes votes of back-shop employees, engaged solely in intrastate activities not directly affecting or burdening interstate commerce and therefore not subject to Federal regulation, even when it is impossible to tell what the result of the election would have been if these votes had not been counted.

7. In failing to hold that an injunction bottomed on publicity given by the petitioner to the existence of, and the facts involved in, a labor dispute and on acts of employees not participated in, ratified or authorized by the petitioner was improperly granted, particularly in view of the provisions of Sections 4 (e), 6 and 7 (a) of the Norris-LaGuardia Act.

8. In holding that Section 9 of the Norris-LaGuardia Act does not prohibit the granting by a Court of the United States of a mandatory injunction in a case involving or growing out of a labor dispute.

9. In affirming the decree of the District Court.

REASONS FOR GRANTING THE WRIT.

1. Whether or not Section 2, Ninth, imposes a legally enforceable obligation to treat is a question of federal law of far reaching importance in the administration of the Railway Labor Act, which has not been, but should in the national public interest be, settled by this Court.

Section 2, Ninth, was inserted in the Railway Labor Act by the 1934 amendments under the heading "Gen-

eral Duties". It provides that upon the receipt by a carrier from the Mediation Board of a certification of a representative of employees, "the carrier *shall treat** with the representative so certified as the representative of the craft or class for the purposes of this Act". This Court has held that a somewhat similar statute, namely, Section 301 of the Transportation Act, 1920, providing that "disputes *shall be considered* and, if possible, decided *in conference* between representatives designated and authorized so to confer by the carriers, or the employees or subordinate officials thereof, directly interested in the dispute", imposed a legally unenforceable duty. This decision was made in the face of an argument identical in substance to the reasoning of the Circuit Court of Appeals in this case (R. 317), namely, that it would "make the act meaningless and wholly ineffective if under the act the parties may not be forced to a conference * * *" (*Pennsylvania Railroad System v. Pennsylvania Railroad Company*, 267 U. S. 203, 216-217 (1925)). It is submitted that the Circuit Court of Appeals should have similarly held that Section 2, Ninth, imposed a legally unenforceable duty, and that the mandatory injunction to treat awarded by paragraph 1 of the decree of the District Court should accordingly be vacated. The question was not determined adversely to this contention by anything in *Texas & N. O. R. Co. v. Brotherhood of Ry. & S. S. Clerks*, 281 U. S. 548 (1930). That case did not overrule the *Pennsylvania* case or question its application to an imperfect obligation not enforceable in terms. To the contrary this Court said in the *Texas* case (at page 568):

> "While an affirmative declaration of duty contained in a legislative enactment may be of imperfect obligation because not enforceable in terms, a

* It may be assumed that all italics are supplied.

> definite statutory prohibition of conduct which would thwart the declared purpose of the legislation cannot be disregarded."

It is submitted that a direction to treat is no less an imperfect obligation unenforceable in terms than a direction to consider disputes in conference. (It is true that in the *Texas* case there was an order in contempt proceedings directing the railroad to reinstate the Brotherhood as the representative of the employees until an election could be held. This order, however, was not made to enforce a statutory obligation, but to require the restoration of the *status quo* as a condition of purging the railroad of contempt.)

It should also be noted that if Section 2, Ninth, is construed to impose a legally enforceable duty to treat, an anomalous result follows, since Section 2, Ninth, imposes a duty to treat only when a representative of the employees has been certified by the Mediation Board, and the Mediation Board is authorized to certify a representative only in case of a dispute among the carrier's employees as to who the representative shall be. Thus, under this construction, when there is such a dispute and the Mediation Board has so certified, the carrier may be compelled to treat with the representative so certified; but if there is no such dispute—as where the employees are in unanimous agreement as to who the representative shall be—the carrier may not be compelled to treat because in such case Section 2, Ninth, is inapplicable.

Furthermore, if Section 2, Ninth, imposes a legally enforceable requirement to treat, it violates the due process clause of the Fifth Amendment, as pointed out *infra* (pp. 14-19), and this is an added reason for construing it to impose only an unenforceable duty.

2. Both the District Court and the Circuit Court of Appeals have construed Section 2, Ninth, of the Railway

Labor Act as imposing a legally enforceable obligation upon the petitioner to treat with the representative certified by the Mediation Board and as precluding the petitioner from entering into any contract, undertaking or agreement concerning rules, rates of pay or working conditions affecting its mechanical department employees except with such representative. Section 2, Ninth, of the Act, so construed, violates, it is submitted, the due process clause of the Fifth Amendment.

(a) This Court has long held that liberty of contract, and particularly the freedom of employers and employees to contract together on equal and voluntary terms with respect to their affairs, partakes of the nature of both liberty and property and falls under the same constitutional protection as property rights of a more concrete nature. *Lochner v. New York*, 198 U. S. 45, 53 (1905); *Adair v. United States*, 208 U. S. 161, 173 (1908); *Hitchman Coal & Coke Co. v. Mitchell*, 245 U. S. 229, 250 (1917). The liberty to refrain from entering into contracts is a part of the liberty of contract, so that legislation which compels the making of contractual agreements is as much a deprivation of liberty and property as is legislation forbidding or interfering with such agreements. *Coppage v. Kansas*, 236 U. S. 1, 20 (1915). In accordance with this principle, this Court said in the *Adair* case (at pages 174-175):

> "* * * it is not within the functions of government—at least, in the absence of contract between the parties—to compel any person, in the course of his business and against his will, to accept or retain the personal services of another * * *. In all such particulars the employer and the employee have equality of right, and any legislation that disturbs that equality is an arbitrary interference with the liberty of contract which no government can legally justify in a free land."

Furthermore in the *Adair* case this Court (at page 173) quoted with approval the following from Cooley on Torts:

> "It is a part of every man's civil rights that he be left at liberty *to refuse business relations* with any person whomsoever, whether the refusal rests upon reason, or is the result of whim, caprice, prejudice, or malice. With his reasons neither the public nor third persons have any legal concern. It is also his right to have *business relations* with anyone with whom he can make contracts, and, if he is wrongfully deprived of this right by others, he is entitled to redress."

Thus liberty of contract includes liberty to refuse to have business relations to any extent.

The 1934 amendments to the Railway Labor Act in some of their provisions squarely and unequivocally disregard and violate these principles. Thus Section 2, as amended by the 1934 Act, seeks to abolish the doctrine of the *Adair* and *Coppage* cases. This Section states it to be one of the purposes of the Act:

> "(2) to forbid * * * *any denial, as a condition of employment* or otherwise, of the right of employees to join a labor organization;"

Section 2, Fourth, and Section 2, Fifth, then attempt to carry out this purpose by expressly prohibiting the very contracts the right to make which this Court held in the *Adair* and *Coppage* cases to be guaranteed by the Constitution. Section 2, Eighth, undertakes by its express terms to make a contract between the employer and the employee and to impose on the employer by this forced contract an obligation to handle all disputes in accordance with the requirements of the Act. Each of these provisions is backed by the drastic penalties provided in Section 2, Tenth.

These compulsory provisions, together with the provision of Section 2, Ninth, as construed by the courts below, compel the petitioner to recognize a labor union as a factor in the conduct of its business, and deny to it its inherent right to deal directly or through other representatives with such of its employees as desire so to deal. These compulsory provisions must be distinguished from the rules adopted by the Labor Board under Title III of the Transportation Act, 1920, which were upheld in *Pennsylvania R. Co. v. United States Railroad Labor Board*, 261 U. S. 72 (1923), against similar objections, on the express ground that they were without binding force. This Court (at page 85) in that case thus answered the railway's contention that the rules violated the principles of the *Adair* and *Coppage* cases:

> "The statute does not require the railway company to recognize or to *deal with or confer with labor unions*. It does not require employees to deal with their employers through their fellow employees. But we think it does vest the Labor Board with power to decide how such representatives *ought* to be chosen, with a view to securing a satisfactory co-operation, and leaves it to the two sides to accept or reject the decision. * * *
>
> "All that we may do in this case is to hold, as we do, that they [the rules] were within the lawful function of the board to render, and, *not being compulsory*, violate no legal or equitable right of the complaining company."

The carrier's liberty is further impaired by the new provisions of Section 3, as re-enacted by the 1934 Act. This section creates the National Railroad Adjustment Board, and the labor members of the Board are selected (Section 3, First, (a)) by "labor organizations of the employees, national in scope, * * *." Disputes of certain enumerated kinds between a carrier and its employees may, under Section 3, First, (i), be referred to this Board by either party without the consent of the other and without any

previous agreement to arbitrate such disputes. By Section 3, First, (m), the awards of the Board are made "final and binding upon both parties to the dispute, except insofar as they shall contain a money award." Thus, if the carrier may be legally compelled to treat with the representative certified by the Mediation Board under Section 2, Ninth, it may be compelled by Section 3 to arbitrate any disputes of the enumerated classes which arise in the course of the treating; for example, disputes growing out of grievances which may exist in the absence of a contract between the parties. Compulsory arbitration resulting in a binding award has never been held by this Court to constitute due process of law.

If the 1934 amendments which attempt to impose the compulsory features pointed out are upheld, the *Adair* and *Coppage* cases must obviously be overruled.

The courts below have erroneously assumed that the constitutional validity of the Act insofar as the Fifth Amendment is concerned was established by the case of *Texas & N. O. R. Co. v. Brotherhood of Ry. & S. S. Clerks,* 281 U. S. 548 (1930). But that decision involved only Section 2, Third, of the 1926 Act, which was as follows:

> "Third. Representatives, for the purposes of this Act, shall be designated by the respective parties in such manner as may be provided in their corporate organization or unincorporated association, or by other means of collective action, without interference, influence, or coercion exercised by either party over the self-organization or designation of representatives by the other."

The opinion in the *Texas* case, after quoting the above provision, says (at page 558):

> "The controversy is with respect to the construction, validity and application of this statutory provision."

None of the above mentioned provisions of the 1934 amendments, or any similar compulsory provisions, were in the 1926 Act and accordingly no such provisions were before this Court or passed upon in the *Texas* case.

(b) Furthermore, the District Court by enjoining the petitioner from entering into any contract, undertaking or agreement concerning rules, rates of pay or working conditions affecting its mechanical department employees except with the Federation (R. 283), and the Circuit Court of Appeals, by affirming the decree, have construed Section 2 of the Railway Labor Act as forbidding a carrier to enter into any contract, undertaking or agreement concerning rules, rates of pay or working conditions except with the representative chosen by the majority of the employees. Thus the carrier is deprived of the right to bargain or contract with those of its employees who do not desire such representation; and this is so whether the carrier desires to contract directly with an individual in the minority or indirectly through an organization by which the minority desires to be represented. By empowering the majority to speak for the minority, Section 2 as thus construed, in effect delegates to the majority the right to prevent the carrier from making a contract with the minority which the minority is willing to make. A somewhat similar delegation to the majority of power to bind the minority was recently condemned by this Court in *Carter v. Carter Coal Company*, 298 U. S. (decided May 18, 1936), as "legislative delegation in its most obnoxious form" and an "intolerable and unconstitutional interference with personal liberty and private property" in derogation of the due process clause of the Fifth Amendment.

Under the cases hereinabove cited, the decision of the Circuit Court of Appeals on these questions, it is submitted, cannot be sustained. The questions are important questions of federal constitutional law which have not

been, but should in the national public interest be, settled by this Court.

3. In failing to hold that the Railway Labor Act is unconstitutional in its entirety in that it attempts to regulate labor relations between carriers and their back-shop employees engaged solely in activities which are intrastate in character and do not directly affect or burden interstate commerce, the Circuit Court of Appeals has decided important questions of federal law in a way in conflict with applicable decisions of this Court and of other circuit courts of appeals, as will appear below.

(a) The Railway Labor Act in terms applies to back-shop employees. This is clear from the definitions of the term "employee" in Section 1, Fifth, of the Act and in the Interstate Commerce Commission's *Rules Governing the Classification of Steam Railway Employees and Reports of their Service and Compensation, infra,* Appendix p. 43. It is also to be observed that no distinction is attempted to be drawn between activities of employees which do and those which do not directly affect or burden interstate commerce. It is clear from the evidence that the back-shop employees are engaged solely in intrastate activities, and this was the conclusion reached by the District Court (R. 270) and adopted by the Circuit Court of Appeals (R. 313).

It is the position of the petitioner that such back-shop work is not so related to the interstate activities of the petitioner as to admit of federal regulation of the employer-employee relationships of such back-shop employees. This question, as far as the petitioner has been able to discover, has not been directly decided by this Court. There are, however, authorities which sup-

port the position of the petitioner. In the first *Employers' Liability Cases*, 207 U. S. 463, 498 (1908), it was pointed out that although a carrier may be engaged in interstate commerce, it may also transact business which is not interstate in character and which does not directly affect or burden interstate commerce. In that case this Court gave, as an example of the latter, work of the type performed by the petitioner's back-shop employees. Although not controlling on the question at issue, *New York, New Haven and Hartford Railroad Co. v. Bezue*, 284 U. S. 415 (1932), is also indicative of this Court's attitude toward the problem. In the last mentioned case this Court held that work upon a locomotive out of service for repairs taking twelve days was not within the Act.

The courts below were of the opinion that back-shop employees are subject to federal regulation because in the event of a strike by such workers the interstate activities of the petitioner may be interfered with. There are at least two conclusive reasons why this test is entirely inadequate and untenable:

(i) It is untenable for the obvious reason that it does not possess the necessary characteristic of a standard. The strike standard fails utterly as a dividing line because, by such standard, all activities, no matter how local in character, would be held to directly burden or affect interstate commerce inasmuch as such activities when interrupted by strikes to some extent affect the stream of interstate commerce. The back-shop work is just as local as similar work done by concerns such as the Baldwin Locomotive Works and the Virginia Bridge and Iron Works. It is clear under *Carter v. Carter Coal Company*, 298 U. S. (decided May 18, 1936), that employer-employee relations in the case of these two concerns could not be subjected to federal regulation on the ground that a strike or labor dis-

turbance therein might interfere with interstate commerce. As was stated in the *Carter* case, the relation of such employers and employees is a local relation, and strikes of such employees are a local evil over which the federal government has no legislative control, and such effect as they may have upon commerce, however extensive it may be, is secondary and indirect. The mere fact that the petitioner has chosen to perform such back shop work itself does not render such work subject to federal regulation. The Circuit Court of Appeals has failed to give proper consideration to the fact that the petitioner, in engaging in the back shop work, is engaged in purely local activities that are as separate and apart from its transportation business as manufacturing or mining. In this respect the court's decision conflicts with the decision in the *Carter* case and also with *National Labor Relations Board v. Jones & Laughlin Steel Corporation*, 83 F. (2d) 998 (C. C. A. 5th, 1936) and *Fruehauf Trailer Company v. National Labor Relations Board*, ___ F. (2d) ___ (C. C. A. 6th, decided June 30, 1936).

(ii) The strike test is also untenable because a strike of the back shop employees resulting in a total shut down of the back shop would not directly interfere with the interstate operations of the petitioner. It is manifest from the testimony that the petitioner could permanently close the Princeton shop tomorrow without occasioning any interruption to its interstate service. As the testimony shows, the back shop employees have no connection with equipment in service. As the testimony also shows, all the work done in the back shop could be handled by outside shops such as those of the Baldwin Locomotive Works and the Virginia Bridge & Iron Works, and the manufactured products made at Princeton could be purchased in the market.

The Circuit Court of Appeals seeks to fill a gap which would otherwise exist in its reasoning by saying (R. 330) that "if labor disturbances of employees such as those who are involved here, warrant the exercise of injunctive power to prevent interference with interstate commerce, as was asserted by the defendant here in the shopmen's strike of 1922 and as was held in *United States v. Railway Employees' Department*, 283 Fed. 479 and 290 Fed. 978, certainly Congress can take appropriate steps to prevent such interference in advance of the disturbance". But in the case of the petitioners only one third of the shopmen are back shop employees and an examination of the opinions cited fails to disclose any basis for a statement that a strike of back shop employees did or would directly interfere with interstate commerce. Direct interference with interstate commerce from a shopmen's strike is due, not to the back shop employees, but to the shopmen employed in making running repairs.

(b) The Railway Labor Act applies in terms to all employees of interstate carriers, irrespective of the fact that some employees may be engaged solely in intrastate activities which do not affect or burden interstate commerce (*supra*, p. 20). It is an unqualified rule that when in the attempted exercise of duly delegated federal power an act attempts to regulate activities both within and outside the scope of federal power, without distinction between the two, it is wholly void. Under the decisions of this Court, if this situation exists, the Court declares the act void as an entirety. It deems itself without power merely to hold it invalid in its application to intrastate activities. *United States v. Reese*, 92 U. S. 214, 221 (1876); *Trade-Mark Cases*, 100 U. S. 82, 96-97 (1879); *James v. Bowman*, 190 U. S. 127, 140 (1903); *Illinois Central Railroad Co. v. McKendree*, 203

U. S. 514, 528-529 (1906); first *Employers' Liability Cases*, 207 U. S. 463 (1908). Nor does the separability provision (Section 8 of the 1934 Act) save the Act or any part of it. It is well settled that when a court can make an act constitutional by striking out words or phrases it may do so, but it is also well settled that a court will not add words of limitation in order to make an invalid act valid, even when the act contains a separability provision. *Hill v. Wallace*, 259 U. S. 44, 70-71 (1922). This doctrine was recently affirmed in *Railroad Retirement Board v. Alton R. Co.*, 295 U. S. 330, 361 (1935). The holding of the Circuit Court of Appeals that the Act could be saved by construction or by the separability provision was accordingly erroneous.

4. In holding that Section 2, Fourth, of the Railway Labor Act which provides that "The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this Act", does not require, in the case of an election to determine who shall be the representative of a craft or class, that the representative receive the votes of a majority of all the eligible members of such craft or class; and in holding that a majority of those voting is sufficient to elect where a majority of those qualified to vote participates in the election, the Circuit Court of Appeals has, it is submitted, misinterpreted the statute. The petitioner believes that it requires the representative to receive the votes of a majority of all the eligible members of such craft or class; otherwise less than a majority (even as low as twenty-six per cent) will have the right to choose the representative and thus control the terms of agreements concerning rates of pay, rules and

working conditions of all the members of the craft or class. It was the manifest purpose of Congress to provide a plan to eliminate as far as possible continual disagreements between carriers and employees and among the employees themselves. This purpose would be thwarted if a minority of a craft or class were permitted to determine such matters, because where less than a majority approves a designated representative there is a tendency for the losing party to seek another election and the issue may not be regarded as definitely settled until a majority of the eligible employees agree upon their choice. Moreover the interpretation of the Circuit Court of Appeals is contrary to the administrative interpretation adopted by the National Mediation Board prior to the decision of the District Court in this case. Since then the Board has adopted a construction similar to that of the District Court and Circuit Court of Appeals herein. See *The Association of Clerical Employees of the A. T. & S. F. Railway System v. Brotherhood of Railway and Steamship Clerks, etc.*, F. (2d) (C. C. A. 7th, decided July 8, 1936), in which this question was also involved. The question is of great importance in the administration of the Act and has not been, but should in the national public interest and for the guidance of the National Mediation Board be, settled by this Court.

5. In failing to decide that the certification of September 13, 1934, of the National Mediation Board under Section 2, Ninth, of the Railway Labor Act is a nullity because it does not contain a finding that a majority of any craft or class of employees voted in favor of the Federation, or even that such a majority participated in the election, and therefore that such certification could not properly be the basis for the injunctive relief granted against the petitioner, the Circuit

Court of Appeals has held valid a certification which does not contain sufficient findings of fact to meet the requirements declared by this Court to be essential in such a case. *Panama Refining Co. v. Ryan*, 293 U. S. 388 (1935), *United States v. Chicago, M., St. P. & P. R. Co.*, 294 U. S. 499 (1935), and *Atchison, T. & S. F. R. Co. v. United States*, 295 U. S. 193 (1935). The certification in question constitutes the very foundation of the cause of action herein. As was said by this Court in the *Panama* case (at page 432),

> "If the citizen is to be punished for the crime of violating a legislative order of an executive officer, or of a board or commission, due process of law requires that it shall appear that the order is within the authority of the officer, board or commission, and, if that authority depends on determinations of fact, those determinations must be shown."

Moreover, the certification shows on its face that the election was conducted under an unlawful rule which contravenes Section 2, Fourth, by providing that each organization receiving a *majority of the legal votes cast* would be recognized as representative of the employees in question, thus permitting a choice to be made by less than a majority of any craft or class.

6. In failing to hold that said certification of the National Mediation Board is a nullity because it improperly includes votes of back-shop employees, engaged solely in intrastate activities not directly affecting or burdening interstate commerce and therefore not subject to federal regulation (*supra*, pp. 20-24), it being impossible to tell what the result of the election would have been if these votes had not been counted, the Circuit Court of Appeals has decided a federal question in a way which the petitioner believes to be in conflict

with applicable decisions of this Court, including *Panama Refining Co. v. Ryan, supra,* and *Atchison T. & S. F. R. Co. v. United States, supra,* and the cases cited, *supra,* pp. 20-24. Under these decisions, it is respectfully submitted, the inclusion of the votes of these back-shop employees in the certification, especially when there is no way of segregating them and determining what the result of the election would have been if only the votes of employees subject to federal regulation had been counted, renders the certification void if it is not void for any other reason.

7. The injunction awarded by paragraph 2 of the decree of the District Court is bottomed on the bulletin of January 20, 1934 (*supra,* p. 6), and the Sasser statement (*supra,* p. 6), both issued by the petitioner, and on acts of employees in respect of which there is no proof whatsoever of participation, authorization or ratification by the petitioner. (The other bulletin was issued in 1922, *supra,* p. 5, and the assistance in "smoothing out" the constitution of the Association was given in the same year, or long before the enactment of the Railway Labor Act, May 20, 1926. There is no contention that any of the financial assistance formerly given to the Association was continued after it became unlawful to give it, *supra,* p. 6. There is no evidence or finding of threats). It is submitted that the bulletin of January 20, 1934, and the Sasser statement were proper communications from employer to employees, not constituting forbidden attempts to "influence" such employees, as the word "influence" is used in Section 2, Third, of the Railway Labor Act of May 20, 1926, and in Section 2, Third and Fourth, of the Railway Labor Act, as amended (*Texas & N. O. R. Co. v. Brotherhood of Ry. & S. S. Clerks,* 281 U. S. 548, 568 (1930), construing the word "influence" in Section 2, Third, of the Railway Labor Act of May 20, 1926).

Section 1 of the Norris-LaGuardia Act specifically provides that "no court of the United States * * * shall have jurisdiction to issue any * * * injunction in a case involving or growing out of a labor dispute, *except in a strict conformity with the provisions of this Act*"; Section 6 provides that no "association or organization participating or interested in a labor dispute, shall be held responsible or liable * * * for the unlawful acts of individual officers, members, or agents, except upon clear proof of actual participation in, or actual authorization of, such acts, or of ratification of such acts after actual knowledge thereof"; and Section 7 (a) prohibits the issuance of an injunction on account of a threat or unlawful act, except against a person, association or organization making or committing, or authorizing or ratifying, such threat or act. Therefore the acts of employees aforesaid could not legally be made the basis of an injunction against the petitioner.

Moreover, even if the bulletin of January 20, 1934, or the Sasser statement was unlawful under the Railway Labor Act, neither of them could legally be made the basis of an injunction against the petitioner. Section 4 (e) of the Norris-LaGuardia Act provides that no court of the United States shall have jurisdiction to issue an injunction in a case involving or growing out of a labor dispute to prohibit any person participating or interested in such dispute from "Giving publicity to the existence of, or the facts involved in, any labor dispute" by a method not involving fraud or violence. All the bulletin and the statement did was to give publicity to the existence of, and the facts involved in, a labor dispute, and an injunction bottomed thereon is tantamount to an injunction against giving in the future publicity to similar facts to the extent that they come within the wording of the decree. The decree in this case makes no attempt to

exclude from its scope the giving of publicity which may not be enjoined. As an example, the petitioner is enjoined, without qualification, from "discouraging its mechanical department employees from becoming or remaining members of the" Federation. Thus no publicity may be given to any facts about the Federation which would have that effect, such as the facts set forth in the Sasser statement. (The Norris-LaGuardia Act was approved March 23, 1932; the *Texas* case, *supra*, was decided May 26, 1930. Hence the decision in that case has no bearing upon the validity of this point.)

It is submitted that the injunction awarded by paragraph 2 of the decree of the District Court contravenes the plain prohibitions of the above mentioned provisions of the Norris-LaGuardia Act and that the error of the Circuit Court of Appeals in affirming the decree accordingly merits review by this Court.

8. Section 9 of the Norris-LaGuardia Act provides in part as follows:

> "* * * every restraining order or injunction granted in a case involving or growing out of a labor dispute *shall include only a prohibition* of such specific act or acts as may be expressly complained of in the bill of complaint * * *."

The mandatory injunction to treat awarded by paragraph 1 of the decree is not "only a prohibition" and therefore clearly contravenes Section 9. The Circuit Court of Appeals decided, however, that Section 9 does not forbid the granting of a mandatory injunction. The question is obviously one of extreme importance in the application of the Norris-LaGuardia Act, which has not been, but should in the national public interest be, settled by this Court.

It is therefore respectfully submitted that, because of the importance and novelty of the questions presented, the writ of certiorari should be granted.

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August 31, 1936.

APPENDIX

EXCERPTS FROM 1934 AMENDMENTS TO THE RAILWAY LABOR ACT

Act of June 21, 1934, Chap. 691, 48 Stat. 1185.

AN ACT

To amend the Railway Labor Act approved May 20, 1926, and to provide for the prompt disposition of disputes between carriers and their employees.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 1 of the Railway Labor Act is amended to read as follows:

"DEFINITIONS

"Section 1. When used in this Act and for the purposes of this Act—

"First. The term 'carrier' includes any express company, sleeping-car company, carrier by railroad, subject to the Interstate Commerce Act, * * *.

"Second. The term 'Adjustment Board' means the National Railroad Adjustment Board created by this Act.

"Third. The term 'Mediation Board' means the National Mediation Board created by this Act.

"Fourth. The term 'commerce' means commerce among the several States or between any State, Territory, or the District of Columbia and any foreign nation, or between any Territory or the District of Columbia and any State, or between any Territory and any other Territory, or between any Territory and the District of Columbia, or within any Territory or the District of Columbia, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign nation.

"Fifth. The term 'employee' as used herein includes every person in the service of a carrier (subject to its continuing authority to supervise and direct the manner of rendition of his service) who performs any work defined as that of an employee or subordinate official in the orders of the Interstate Commerce Commission now in effect, and as the same may be amended or interpreted by orders hereafter entered by the Commission pursuant to the authority which is hereby conferred upon it to enter orders amending or interpreting such existing orders: *Provided, however,* That no occupational classification made by order of the Interstate Commerce Commission shall be construed to define the crafts according to which railway employees may be organized by their voluntary action, nor shall the jurisdiction or powers of such employee organizations be regarded as in any way limited or defined by the provisions of this Act or by the orders of the Commission.

"Sixth. The term 'representative' means any person or persons, labor union, organization, or corporation designated either by a carrier or group of carriers or by its or their employees, to act for it or them.

(USC Title 45, §151.)

* * * * *

Sec. 2. Section 2 of the Railway Labor Act is amended to read as follows:

"GENERAL PURPOSES

"Sec. 2. The purposes of the Act are: (1) To avoid any interruption to commerce or to the operation of any carrier engaged therein; (2) to forbid any limitation upon freedom of association among employees or any denial, as a condition of employment or otherwise, of the right of employees to join a labor organization; (3) to provide for the complete independence of carriers and of employees in the matter of self-organization to carry out the purposes of this Act; (4) to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions; (5) to

provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions. (USC Title 45, §151a.)

"GENERAL DUTIES

"First. It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.

"Second. All disputes between a carrier or carriers and its or their employees shall be considered, and, if possible, decided, with all expedition, in conference between representatives designated and authorized so to confer, respectively, by the carrier or carriers and by the employees thereof interested in the dispute.

"Third. Representatives, for the purposes of this Act, shall be designated by the respective parties without interference, influence, or coercion by either party over the designation of representatives by the other; and neither party shall in any way interfere with, influence, or coerce the other in its choice of representatives. Representatives of employees for the purposes of this Act need not be persons in the employ of the carrier, and no carrier shall, by interference, influence, or coercion seek in any manner to prevent the designation by its employees as their representatives of those who or which are not employees of the carrier.

"Fourth. Employees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this Act. No carrier, its officers or agents, shall deny

or in any way question the right of its employees to join, organize, or assist in organizing the labor organization of their choice, and it shall be unlawful for any carrier to interfere in any way with the organization of its employees, or to use the funds of the carrier in maintaining or assisting or contributing to any labor organization, labor representative, or other agency of collective bargaining, or in performing any work therefor, or to influence or coerce employees in an effort to induce them to join or remain or not to join or remain members of any labor organization, or to deduct from the wages of employees any dues, fees, assessments, or other contributions payable to labor organizations, or to collect or to assist in the collection of any such dues, fees, assessments, or other contributions: *Provided*, That nothing in this Act shall be construed to prohibit a carrier from permitting an employee, individually, or local representatives of employees from conferring with management during working hours without loss of time, or to prohibit a carrier from furnishing free transportation to its employees while engaged in the business of a labor organization.

"Fifth. No carrier, its officers, or agents shall require any person seeking employment to sign any contract or agreement promising to join or not to join a labor organization; and if any such contract has been enforced prior to the effective date of this Act, then such carrier shall notify the employees by an appropriate order that such contract has been discarded and is no longer binding on them in any way.

"Sixth. In case of a dispute between a carrier or carriers and its or their employees, arising out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, it shall be the duty of the designated representative or representatives of such carrier or carriers and of such employees, within ten days after the receipt of notice of a desire on the part of either party to confer in respect to such dispute, to specify a time and place at which such conference shall be held: *Provided*, (1) That the place so specified shall be situated upon the line of the carrier in-

volved or as otherwise mutually agreed upon; and (2) that the time so specified shall allow the designated conferees reasonable opportunity to reach such place of conference, but shall not exceed twenty days from the receipt of such notice: *And provided further,* That nothing in this Act shall be construed to supersede the provisions of any agreement (as to conferences) then in effect between the parties.

"Seventh. No carrier, its officers or agents shall change the rates of pay, rules, or working conditions of its employees, as a class as embodied in agreements except in the manner prescribed in such agreements or in section 6 of this Act.

"Eighth. Every carrier shall notify its employees by printed notices in such form and posted at such times and places as shall be specified by the Mediation Board that all disputes between the carrier and its employees will be handled in accordance with the requirements of this Act, and in such notices there shall be printed verbatim, in large type, the third, fourth, and fifth paragraphs of this section. The provisions of said paragraphs are hereby made a part of the contract of employment between the carrier and each employee, and shall be held binding upon the parties, regardless of any other express or implied agreements between them.

"Ninth. If any dispute shall arise among a carrier's employees as to who are the representatives of such employees designated and authorized in accordance with the requirements of this Act, it shall be the duty of the Mediation Board, upon request of either party to the dispute, to investigate such dispute and to certify to both parties, in writing, within thirty days after the receipt of the invocation of its services, the name or names of the individuals or organizations that have been designated and authorized to represent the employees involved in the dispute, and certify the same to the carrier. Upon receipt of such certification the carrier shall treat with the representative so certified as the representative of the craft or class for the purposes of this Act. In such an investigation, the Mediation Board shall be authorized to take a

secret ballot of the employees involved, or to utilize any other appropriate method of ascertaining the names of their duly designated and authorized representatives in such manner as shall insure the choice of representatives by the employees without interference, influence, or coercion exercised by the carrier. In the conduct of any election for the purposes herein indicated the Board shall designate who may participate in the election and establish the rules to govern the election, or may appoint a committee of three neutral persons who after hearing shall within ten days designate the employees who may participate in the election. The Board shall have access to and have power to make copies of the books and records of the carriers to obtain and utilize such information as may be deemed necessary by it to carry out the purposes and provisions of this paragraph.

"Tenth. The willful failure or refusal of any carrier, its officers or agents to comply with the terms of the third, fourth, fifth, seventh, or eighth paragraph of this section shall be a misdemeanor, and upon conviction thereof the carrier, officer, or agent offending shall be subject to a fine of not less than $1,000 nor more than $20,000 or imprisonment for not more than six months, or both fine and imprisonment, for each offense, and each day during which such carrier, officer, or agent shall willfully fail or refuse to comply with the terms of the said paragraphs of this section shall constitute a separate offense. It shall be the duty of any district attorney of the United States to whom any duly designated representative of a carrier's employees may apply to institute in the proper court and to prosecute under the direction of the Attorney General of the United States, all necessary proceedings for the enforcement of the provisions of this section, and for the punishment of all violations thereof and the costs and expenses of such prosecution shall be paid out of the appropriation for the expenses of the courts of the United States: *Provided*, That nothing in this Act shall be construed to require an individual employee to render labor or service without his consent, nor shall anything in this Act be construed to make the quitting of his labor by an individual employee an illegal

act; nor shall any court issue any process to compel the performance by an individual employee of such labor or service, without his consent." (USC Title 45, § 152.)

Sec. 3. Section 3 of the Railway Labor Act is amended to read as follows:

"NATIONAL BOARD OF ADJUSTMENT—GRIEVANCES — INTERPRETATION OF AGREEMENTS

"Sec. 3. First. There is hereby established a Board, to be known as the 'National Railroad Adjustment Board', the members of which shall be selected within thirty days after approval of this Act, and it is hereby provided—

"(a) That the said Adjustment Board shall consist of thirty-six members, eighteen of whom shall be selected by the carriers and eighteen by such labor organizations of the employees, national in scope, as have been or may be organized in accordance with the provisions of section 2 of this Act.

* * * * *

"(c) The national labor organizations, as defined in paragraph (a) of this section, acting each through the chief executive or other medium designated by the organization or association thereof, shall prescribe the rules under which the labor members of the Adjustment Board shall be selected and shall select such members and designate the division on which each member shall serve; but no labor organization shall have more than one representative on any division of the Board.

* * * * *

"(i) The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on the date of approval of this Act, shall be handled in the usual manner up to and including the chief operating officer

of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes.

* * * * *

"(m) The awards of the several divisions of the Adjustment Board shall be stated in writing. A copy of the awards shall be furnished to the respective parties to the controversy, and the awards shall be final and binding upon both parties to the dispute, except insofar as they shall contain a money award. In case a dispute arises involving an interpretation of the award the division of the Board upon request of either party shall interpret the award in the light of the dispute.

"(n) A majority vote of all members of the division of the Adjustment Board shall be competent to make an award with respect to any dispute submitted to it.

"(o) In case of an award by any division of the Adjustment Board in favor of petitioner, the division of the Board shall make an order, directed to the carrier, to make the award effective and, if the award includes a requirement for the payment of money, to pay to the employee the sum to which he is entitled under the award on or before a day named.

"(p) If a carrier does not comply with an order of a division of the Adjustment Board within the time limit in such order, the petitioner, or any person for whose benefit such order was made, may file in the District Court of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the carrier operates, a petition setting forth briefly the causes for which he claims relief, and the order of the division of the Adjustment Board in the premises. Such suit in the District Court of the United States shall proceed in all respects as other civil suits, except that on the trial of such suit the findings and order of the division of the Adjustment Board shall be prima facie evidence of the facts therein

stated, and except that the petitioner shall not be liable for costs in the district court nor for costs at any subsequent stage of the proceedings, unless they accrue upon his appeal, and such costs shall be paid out of the appropriation for the expenses of the courts of the United States. If the petitioner shall finally prevail he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit. The district courts are empowered, under the rules of the court governing actions at law, to make such order and enter such judgment, by writ of mandamus or otherwise, as may be appropriate to enforce or set aside the order of the division of the Adjustment Board.

* * * * *

(USC Title 45, §153.)

Sec. 6. Section 6 of the Railway Labor Act is amended to read as follows:

"Sec. 6. Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon as required by section 5 of this Act, by the Mediation Board, unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Mediation Board."

(USC Title 45, §156.)

Sec. 8. If any section, subsection, sentence, clause, or phrase of this Act is for any reason held to be unconstitutional, such decision shall not affect the validity of the remaining portions of this Act. All Acts or parts of Acts inconsistent with the provisions of this Act are hereby repealed.*

(USC Title 45, §161.)

EXCERPTS FROM
THE NORRIS-LAGUARDIA ACT

Act of March 23, 1932, Chap. 90, 47 Stat. 70.

AN ACT

To amend the Judicial Code and to define and limit the jurisdiction of courts sitting in equity, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That no court of the United States, as herein defined, shall have jurisdiction to issue any restraining order or temporary or permanent injunction in a case involving or growing out of a labor dispute, except in a strict conformity with the provisions of this Act; nor shall any such restraining order or temporary or permanent injunction be issued contrary to the public policy declared in this Act. (USC Title 29, §101.)

Sec. 4. No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or per-

*The following is Section 11 of the Railway Labor Act as enacted May 20, 1926 (44 Stat. 587):

> "If any provision of this Act, or the application thereof to any person or circumstance, is held invalid, the remainder of the Act, and the application of such provision to other persons or circumstances, shall not be affected thereby."

The foregoing is the separability provision quoted by the Circuit Court of Appeals (R. 332). The Code of the Laws of the United States of America, 1934 edition, treats this provision as superseded by Section 8 of the 1934 Act.

sons participating or interested in such dispute (as these terms are herein defined) from doing, whether singly or in concert, any of the following acts:

* * * * *

(e) Giving publicity to the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, patrolling, or by any other method not involving fraud or violence;

* * * * *

(USC Title 29, §104.)

Sec. 6. No officer or member of any association or organization, and no association or organization participating or interested in a labor dispute, shall be held responsible or liable in any court of the United States for the unlawful acts of individual officers, members, or agents, except upon clear proof of actual participation in, or actual authorization of, such acts, or of ratification of such acts after actual knowledge thereof. (USC Title 29, §106.)

Sec. 7. No court of the United States shall have jurisdiction to issue a temporary or permanent injunction in any case involving or growing out of a labor dispute, as herein defined, except after hearing the testimony of witnesses in open court (with opportunity for cross-examination) in support of the allegations of a complaint made under oath, and testimony in opposition thereto, if offered, and except after findings of fact by the court, to the effect—

(a) That unlawful acts have been threatened and will be committed unless restrained or have been committed and will be continued unless restrained, but no injunction or temporary restraining order shall be issued on account of any threat or unlawful act excepting against the person or persons, association, or organization making the threat or committing the unlawful act or actually authorizing or ratifying the same after actual knowledge thereof;

* * * * *

(USC Title 29, §107.)

Sec. 9. No restraining order or temporary or permanent injunction shall be granted in a case involving or growing out of a labor dispute, except on the basis of findings of fact made and filed by the court in the record of the case prior to the issuance of such restraining order or injunction; and every restraining order or injunction granted in a case involving or growing out of a labor dispute shall include only a prohibition of such specific act or acts as may be expressly complained of in the bill of complaint or petition filed in such case and as shall be expressly included in said findings of fact made and filed by the court as provided herein. (USC Title 29, §109.)

Sec. 13. When used in this Act, and for the purposes of this Act—

(a) A case shall be held to involve or to grow out of a labor dispute when the case involves persons who are engaged in the same industry, trade, craft, or occupation; or have direct or indirect interests therein; or who are employees of the same employer; or who are members of the same or an affiliated organization of employers or employees; whether such dispute is (1) between one or more employers or associations of employers and one or more employees or associations of employees; (2) between one or more employers or associations of employers and one or more employers or association of employers; or (3) between one or more employees or associations of employees and one or more employees or associations of employees; or when the case involves any conflicting or competing interests in a "labor dispute" (as hereinafter defined) of "persons participating or interested" therein (as hereinafter defined).

(b) A person or association shall be held to be a person participating or interested in a labor dispute if relief is sought against him or it, and if he or it is engaged in the same industry, trade, craft, or occupation in which such dispute occurs, or has a direct or indirect interest therein, or is a member, officer, or agent of any association composed in whole or in part of employers or employees engaged in such industry, trade, craft, or occupation.

(c) The term "labor dispute" includes any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee.

* * * * *

(USC Title 29, §113.)

EXCERPT FROM THE INTERSTATE COMMERCE COMMISSION'S "RULES GOVERNING THE CLASSIFICATION OF STEAM RAILWAY EMPLOYEES AND REPORTS OF THEIR SERVICE AND COMPENSATION, EFFECTIVE ON JULY 1, 1921."

Definition of Employees.—The word employees, as used herein, is intended to include every person in the service of the reporting carrier subject to its continuing authority to supervise and direct the manner of rendition of his service. Persons engaged to render only specifically defined service and not subject to the continuing authority of the carrier to supervise and control their acts, such as customhouse brokers, lawyers retained only for specific cases and not under general or continuing retainer, etc., are not employees in the meaning of the term used herein.

(Washington, Government Printing Office, 1921, page 7.)

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CHARLES ELMORE CR
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Supreme Court of the United States

OCTOBER TERM, 1936.

No. 324.

THE VIRGINIAN RAILWAY COMPANY,
Petitioner,

vs.

SYSTEM FEDERATION NO. 40, RAILWAY EMPLOYEES DEPARTMENT OF THE AMERICAN FEDERATION OF LABOR, ETC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

BRIEF ON BEHALF OF PETITIONER.

JAMES PIPER,
H. T. HALL,
W. H. T. LOYALL,
JOHN C. DONNALLY,
Counsel for Petitioner.

The Daily Record Co. Print, Baltimore.

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